

# **The United States Judiciary's Role in Protecting the Global Atmosphere as A Shared Trust Asset**

*By*

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## *Abstract*

This article-in-progress suggests an ambitious role for the judiciary in enforcing a trust responsibility for the protection of the globe's atmosphere. A trust approach characterizes the Earth's atmosphere as a shared trust asset held in common among all nations of the world as co-tenant trustees. The article draws upon long-standing doctrine in the area of public trust law that holds government accountable as a trustee for preserving resources that are crucial to the welfare of present and future generations. The article outlines a domestic claim that could be brought by any sovereign (state or tribe) against the federal government in federal district court for the federal government's wholesale failure to address the contribution of greenhouse gasses from United States sources. While this claim could not directly address international sources, the doctrinal genesis of the claim (the public trust doctrine) is manifest in many other countries throughout the world, and United States judicial precedent could spur other similar rulings world-wide.

The global warming crisis is unlike any other faced by the legal system. It carries more devastating consequences, calls for more ambitious, wide-spread action, and has a shorter time fuse than any other environmental issue. Standard legal approaches using the legislative and executive branches of government may not yield the necessary greenhouse gas reductions in time. The public trust doctrine is perhaps unparalleled in the law, as it suggests an aggressive oversight role for the judiciary towards the other two branches of government. Through common law powers, courts have invalidated legislative transfers of crucial resources out of the public trust. At least the same level of judicial involvement is called for when dealing with the globe's atmosphere, the warming of which jeopardizes all life on Earth. A court's injunctive powers provide perhaps the only governmental response that is sufficiently swift to address this problem in time. The head climate scientist at the NASA Goddard Institute for Space Studies has proclaimed: "[W]e have at most ten years – not ten years to decide upon action, but ten years to alter fundamentally the trajectory of global greenhouse emissions."<sup>1</sup>

A trust approach to global warming has several strengths. First, it holds government accountable on a macro scale for the United States' 25% contribution to greenhouse gasses. At a time when policy-makers seem paralyzed by the magnitude of the problem, a macro focus gives clarity and guidance as to necessary action. Second, as an approach that draws upon sovereign property rights, it defeats private takings claims resulting from the extraordinary regulation that may be needed to prevent a global climate disaster. Third, it draws upon the states' and tribal

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<sup>1</sup> Jim Hansen, *The Threat to the Planet*, *The New York Review*, 12, 16 (2006).

sovereign' co-trustee status to offer a firmer foundation for standing. Fourth, it strikes at the heart of the problem -- government's abdication of responsibility -- and offers a non-discretionary trustee standard by which to measure government's performance. At a time when the U.S. Environmental Protection Agency is claiming discretion *not* to regulate greenhouse gasses under the Clean Air Act, such a mandatory trust duty is timely and important.

Fifth, a trust claim engages the courts, through common law, as a legitimate third branch of government charged with protection of natural resources. In the modern era of statutory law, courts have largely retreated from their historically prominent role in securing and protecting the resources crucial to society. Their approach has sometimes been overly deferential to the other two branches of government, contributing, perhaps, to an imbalance of power that produced the natural resource crisis of today. Finally, a trust approach is comprehensible to the media and the public. Every citizen can understand the ethical mandate of saving resources for future generations. Few can comprehend, however, the intricacies of the Clean Air Act or other relevant environmental statutes. Court decisions that rely on the trust paradigm will likely be better understood by the press and more well-received by the public, as they strike a common chord in our society.

Part I of this article will present the context of global warming and the deficiencies in the current regulatory system. Part II will present a trust framework and characterize the United States as a sovereign co-tenant trustee of the global atmosphere. Part III will present three duties arising from that status: 1) the duty of a co-tenant not to waste a common asset; 2) the duty of a governmental trustee to protect the trust; 3) the duty of a governmental trustee to restore the trust where it has been damaged. This part of the article argues that, although the United States has no regulatory control over the actions of other nations that also contribute to global warming, such lack of control has no bearing on its own responsibility to control domestic emissions, which account for at least 25% of the global greenhouse gasses.

Part IV will address commonly asserted barriers to global warming litigation: 1) the political question issue; 2) pre-emption by the Clean Air Act; 3) standing; and 4) sovereign immunity, among others. The trust claim has inherent aspects that overcome such barriers.

Part V will address the remedy portion of a trust case. By drawing upon examples and precedent from treaty rights litigation -- dealing with a migratory salmon asset held in trust and shared among multiple sovereigns -- the article will suggest a consent decree process as a remedy to implement broad parameters set by a court. In this capacity, the court sets mileposts of achievement (*i.e.*, a certain percent reduction in global greenhouse gasses from the U.S. sector, or a sub-sector within a certain time frame), and the various sovereigns implement the remedy through their own regulatory and legislative processes. This process preserves the separation of powers between the branches of government while allowing a form of judicial oversight that produces results more expeditiously than a process left exclusively to the political branches. A remedy produced through consent decree is subject to continuing enforcement authority of the court.

